Supreme Court, U.S.
FILED
NOV 13 1992
OFFICE OF THE CLERK

No. 91-2024

IN THE
Supreme Court of the United States
October Term, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,

Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO, in her official capacity as President of the Board of Education of Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

NATHAN LEWIN
(COUNSEL OF RECORD)
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")
135 West 50th Street--6th Floor
New York, New York 10020
(212) 641-8992

Attorneys for *Amicus Curiae*
National Jewish Commission on Law and Public Affairs ("COLPA")

DICK BAILEY SERVICE (212) 608-7646 (718) 447-5358 (516) 222-2470 (914) 682-0848 Fax (718) 273-8031
1-800-564-4913

TABLE OF CONTENTS

Pages

Introduction and Interest of the *Amicus Curiae* 1

Argument 5

I. An Organization May Not Be Denied Access To A Limited Public Forum Merely Because It Is Intending To Engage In Religious Expression 5

A. A Prohibition on All Meetings Conducted for "Religious Purposes" Is Not "Narrowly Drawn" 7

B. A Prohibition on All Meetings Conducted for "Religious Purposes" Does Not Serve "Any Compelling State Interest" 8

II. Constitutionally Overbroad Authority Is Delegated To The School District's Administrators By A Statute And Rule Denying Access For "Religious Purposes" 11

Conclusion 12

TABLE OF AUTHORITIES

Cases — *Pages*

ACLU of Kentucky v. Wilkinson, 895 F.2d 1098 (6th Cir. 1990) 8

Americans United for Separation of Church and State v. City of Grand Rapids, 922 F.2d 303 (6th Cir. 1991) 8

Americans United for Separation of Church and State v. City of Grand Rapids, Nos. 90-2337 and 91-1391/1448 (decided November 16, 1992) 8

Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990) 9

Congregation Lubavitch v. City of Cincinnati, 923 F.2d 458 (6th Cir. 1991) 8

Forsyth County, Georgia v. Nationalist Movement, 112 S. Ct. 2395 (1992) 11

International Society for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2705 (1992) 5

Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990) 8

Lee v. Weisman, 112 S. Ct. 2649 (1992) 10

McDaniel v. Paty, 435 U.S. 618 (1978) 9

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 5,6

Pages

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 11

Widmar v. Vincent, 454 U.S. 263 (1981) 9,10

IN THE
Supreme Court of the United States
October Term, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,

Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO, in her official capacity as President of the Board of Education of Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs ("COLPA") is a national organization of volunteer lawyers and social scientists dedicated to combating all

forms of religious prejudice and discrimination and to representing the position of the nation's Orthodox Jewish community before courts, legislatures, and other governmental bodies.[1] Over the past quarter century,

---

[1] COLPA has represented the full range of major national rabbinic, congregational, and educational organizations within the Orthodox Jewish Community. These include, and this brief is submitted on behalf of, the following:

a. Agudath Israel of America;
b. National Council of Young Israel;
c. The Rabbinical Alliance of America;
d. The Rabbinical Council of America;
e. Torah Umesorah, National Society of Hebrew Day Schools;
f. The Union of Orthodox Jewish Congregations of America; and
g. The Union of Orthodox Rabbis of the United States and Canada.

Agudath Israel of America is a national organization with congregational and individual members with branches in major Jewish population centers throughout the country. The National Council of Young Israel is a coordinating body for more than 185 affiliated Orthodox Jewish synagogues throughout the United States. The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world with a membership in excess of 1,000. The Union of Orthodox Jewish Congregations of America is a central spokesman for over 1,000 Orthodox Jewish congregations in this country. All of the organizations on behalf of whom this brief is filed share a vital concern for the protection in America of religious liberty and freedom

COLPA has filed numerous briefs *amicus curiae* in this Court and in the nation's courts of appeals in many of the leading First Amendment cases and in other cases of importance to the Orthodox Jewish community.

This case presents an issue of particular significance to the Orthodox Jewish community - i.e., whether the Constitution permits state officials to bar from a publicly owned "limited public forum" a law-abiding citizens' group exclusively because the subject of the group's intended meeting is "religious."

Government officials must learn that the First and Fourteenth Amendments' protection for rights of free speech and free exercise of religion prohibit relegating religious speech to second-class status. In this case, the public school officials who selectively denied use of a "limited public forum" to a religiously oriented group invoked a New York state statute as grounds for their discriminatory refusal of the plaintiff's application. That singular aspect of this case makes it particularly important to this *amicus* and to the many Orthodox Jewish organizations it represents.

Jewish groups - including synagogues, religious schools and their affiliated entities - frequently need to use premises other than those which they own for large meetings, rallies, or other community activities. Publicly owned meeting rooms that have been made available to private secular organizations should be equally accessible to synagogues and religious schools even though these entities deliver a religious message. Yet the statutes and regulations that authorize the leasing or licensing of public premises frequently omit churches, synagogues, and religious groups from the enumeration of those who may be granted permission to use the public facility. And, like New York's Education Law, they do not list religious instruction as a permissible "public purpose" for which the premises

may be used.

There is, we submit, no legitimate basis in the Constitution, in America's history, or in today's society for barring religious speech from any available public forum. Particularly in a case such as this one - where the use of the public facility by the religious group raises no conceivable appearance of "endorsement" or other "symbolic union" between church and state - the Constitution condemns a government policy that prefers secular speech to religious speech and permits the former while prohibiting the latter.

There is, moreover, a second critical constitutional flaw in the local procedure approved by the court below. It appears from this record that a governmental official was empowered to make an *ad hoc* determination as to the "religious" character of the petitioners' intended use of the public school premises. Because the official vested with licensing authority "suspect[ed] that [petitioners' program] would certainly have religious connotations, " she did not grant petitioners' application the almost automatic approval for use of the public premises that had previously been granted to secular groups (and even to some groups with religious missions). Thereafter, she determined from her own viewing of the petitioners' film that it "does appear to be church related." This finding resulted in denial of the request. Such empowerment of an individual bureaucrat to search for religious ingredients in an applicant's request to utilize public property is a license for sporadic, irregular and inconsistent administration and an invitation invidiously to distinguish among applicants.

The Jewish institutions we represent fear the consequences of licensing based on individualized determinations of whether a proposed program is "church-related" or has "religious connotations." Access to government property - particularly for the purpose of free speech - should not depend on whether a government

bureaucrat believes that the program to be presented is too "religious."

ARGUMENT

I.

AN ORGANIZATION MAY NOT BE DENIED ACCESS TO A LIMITED PUBLIC FORUM MERELY BECAUSE IT IS INTENDING TO ENGAGE IN RELIGIOUS EXPRESSION

This Court very recently articulated the constitutional standard that governs regulation of a limited public forum. In *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992), the Court stated that regulations on speech in a "traditional public forum" are "subject to the highest scrutiny" and that they "survive only if they are narrowly drawn to achieve a compelling state interest." The Court then discussed "the designated public forum, whether of a limited or unlimited character" and said that "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum."

This articulation of the governing standard applies to any content-based distinction that government agents seek to make in the use of a "limited public forum." In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), this Court discussed the standards governing "public property which the State has opened for use by the public as a place for expressive activity." The Court said, with respect to this "limited public forum," that "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be

narrowly drawn to effectuate a compelling state interest." Exclusion of religious speech is plainly a "content-based prohibition."

Access to a "limited public forum" may, therefore, be limited only to the extent that the limitation serves "a compelling state interest" and only if the regulation is "narrowly drawn." It is not enough for those who control such a forum to say, as the business manager and district clerk of the public school district did in this case, that "religious purposes" had never been a use to which the school facilities had been put. The defendants had the burden of demonstrating that putting the facilities to such a use would harm "a compelling state interest."

The court of appeals mistakenly believed that if the defendants had not previously opened their public school facility to "religious uses and purposes," they could deny the plaintiffs' application to use the premises to show a film delivering a religious message (Pet. App. 12a). The court relied, in this regard, on Section 414 of New York's Education Law, which "nowhere permitted" use of public school premises for "religious uses" and on the School District's own Local Rule No. 7 that declares "school premises shall not be used by any group for religious purposes" (Pet. App. 10a).

The statutory omission and the regulatory exhortation violate the constitutional rules that govern limited public forums as articulated recently in the *Krishna Consciousness* case and earlier in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). If New York Education Law § 414 bars all meetings in public schools for "religious purposes" it sweeps far too broadly to meet the "narrowly drawn" component of the constitutional test. And such a broad prohibition on *all* meetings for religious purposes surely cannot be said to serve "a compelling state interest."

A. A Prohibition on All Meetings Conducted for "Religious Purposes" Is Not "Narrowly Drawn."

The standard which the School District adopted in its Local Rule - which appears to be the standard utilized by the court below - is exceedingly broad. It essentially bars from use of the school's premises any and all churches, synagogues and groups whose members share a religious bond. Presumably any activity by an organization that is legally recognized under a law such as New York's Religious Corporation Law, or any organization that has in its title the words "Jewish" or "Christian" (including the American Jewish Congress and the YMCA) could be said to be serving a "religious purpose" if it sought to conduct a meeting at the Center Moriches public school. Would a Jewish organization meeting to view the film "Fiddler on the Roof" be gathering for a religious purpose? Would a Jewish cooking club that gathers to discuss kosher recipes be assembling for a religious purpose? Would a meeting of the Knights of Columbus that is called to hear a priest speak about the homeless be considered an event held for a religious purpose?

Indeed, if a church held a rally to raise funds for the homeless, such an event would appear to serve the religious purpose of the church's charitable mission. And if a synagogue held a meeting to discuss the situation of Jews in the former Soviet Union, would the gathering be viewed as having a religious purpose? Would the result be any different if the proposed discussion related to the issue of how to bring refugees from the Soviet Union to an increased level of religious observance?

We cite these examples only to prove how broadly drawn the existing standard is. If there is, in fact, any legitimate governmental interest in denying access to meetings conducted for "religious purposes" - a subject to

which we now turn--the standard used by the School District and by the Second Circuit (and, by implication, by New York's Education Law) is plainly overbroad.

B. A Prohibition on All Meetings Conducted for "Religious Purposes" Does Not Serve Any "Compelling State Interest."

We recognize that there are circumstances in which expression, including religious, at a public forum jeopardizes legitimate governmental interests. Time, place and manner restrictions on such speech may legitimately be imposed in a neutral way to implement strong state interests. A private group may not insist, for example, on using a public school auditorium for raucous events or at times when the premises cannot reasonably be made available.

Another compelling state interest is presented by the limitations imposed by the Establishment Clause. If a government agency engages in religious speech at a public forum, the identification of that sectarian expression with government may create an appearance of impermissible government endorsement. And there have been cases in which lower federal courts have barred wholly private religious speech in a public forum because the particular form of the private expression conveyed the appearance of government "sponsorship" of religion. *See, e.g., Kaplan v. City of Burlington,* 891 F.2d 1024, 1030 (2d Cir. 1989),

---

[2]The Second Circuit's ruling in *Kaplan* that there was a violation of the Establishment Clause has been explicitly rejected by the Sixth Circuit in *ACLU of Kentucky v. Wilkinson,* 895 F.2d 1098, 1102 (6th Cir. 1990); *Americans United for Separation of Church and State v. City of Grand Rapids,* 922 F.2d 303, 309 (6th Cir. 1991); *Congregation Lubavitch v. City of Cincinnati,* 923 F.2d 458, 462 (6th Cir. 1991); and *Americans United for Separation of Church and State v. City of Grand Rapids,* Nos. 90-2337 and 91-1391/1448 (decided November 16, 1992).

In these circumstances, some courts have prohibited religious expression in a public forum in the ground that "[o]bservance of the constitutional mandate of the Establishment Clause may properly be characterized as a compelling governmental interest." 891 F.2d at 1030. That general principle is derived from this Court's opinion in *Widmar v. Vincent,* 454 U.S. 263, 275-76 (1981)--a decision that, while supporting the existence of a compelling governmental interest in some cases, at the same time refutes the applicability of that principle in this case.

Use by a religious group for religious purposes of public school facilities that are freely made available to secular groups raises no Establishment Clause issue. In this case, as in *Widmar v. Vincent,* it is simply untrue "that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." 454 U.S. at 273. Indeed, the School District has never even made such an argument. Its desire to keep meetings for "religious purposes" out of public school facilities seems to be aimed at reducing controversy, not at avoiding the appearance of state endorsement of any religious faith.

Moreover, exclusion of religious speech from a limited public forum constitutes prohibited discrimination against religion. As this Court said in *Board of Education of Westside Community Schools v. Mergens,* 110 S. Ct. 2356, 2371 (1990), "[I] f a State refused to let religious groups use facilities open to others, then it would be demonstrating . . . hostility toward religion." And in *McDaniel v. Paty,* 435 U.S. 618, 641 (1978), Justice Brennan said in his concurring opinion, "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."

And, from an objective standpoint, it is clear beyond peradventure that if the petitioners are permitted to meet and show their film on the premises of the Center Moriches public school no one--not even the most misguided "reasonable observer" (*Allegheny County v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989))--could believe that the governmental authorities are "endorsing" petitioners' faith or "disapproving" other religions.

There may be circumstances under which the use of public school facilities by a religious group so directly affects the schoolchildren attending the school that a real Establishment Clause problem is created. This Court has been particularly sensitive to the nuances of religious coercion of impressionable school-age children. *See Lee v. Weisman*, 112 S. Ct. 2649 (1992). And we agree that if a religious group sought to use public school premises during school hours (or immediately before or after school hours) in a manner that would result or appear to encourage the proselytization of schoolchildren, the school's governing authorities should be permitted to invoke the Establishment Clause to deny such use.

But that is not this case. Nor is that "compelling interest" the subject of any "narrowly drawn" law or regulation. The actual prohibition imposed by the defendants takes in much activity and many groups that present no such dangers. Hence the New York law and the School District's Rule No. 7, as applied to these petitioners, are unconstitutional under the Free Speech and Free Exercise of Religion Clauses of the First Amendment. *See Widmar v. Vincent*, 454 U.S. 263, 276 (1981) ("the state interest asserted here--in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution--is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well").

II.

CONSTITUTIONALLY OVERBROAD AUTHORITY IS DELEGATED TO THE SCHOOL DISTRICT'S ADMINISTRATORS BY A STATUTE AND RULE DENYING ACCESS FOR "RELIGIOUS PURPOSES"

A secondary--but important--constitutional objection to the process approved by the court below inheres on the extraordinary breadth of the standard under which the defendants acted in denying the petitioners' application. The responsible official of the School District made an *ad hoc* decision that the film to be shown at petitioners' proposed event was "church related" and that, on that account, the auditorium could not be used.

This is too loose a standard to be constitutionally permitted in the area of free expression. It singles out churches, synagogues and other religiously affiliated groups and subjects them particularly to an advance licensing system that is guided by no definite and understandable criteria.

This Court's decisions have firmly established the constitutional principle "that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969), and authorities there cited; *see also Forsyth County, Georgia v. Nationalist Movement*, 112 S. Ct. 2395, 2401-02 (1992). That bedrock constitutional rule is violated if a public school official is entitled, with no more specific standard than "church related" or "religious purposes," to select among groups that wish to use public facilities for private expression.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")
135 West 50th Street--6th Floor
New York, New York 10020
(212) 641-8992

Attorneys for *Amicus Curiae*
National Jewish Commission on
Law and Public Affairs ("COLPA")